general merchant. He travels a lot. *I received instructions by telephone to ask lawyers to apply to set aside service. He calls me once or twice a week to instruct me on business matters* (our emphasis).

Singapore is only a 'station' for him. His travels at times last six months. He is here only for two weeks or so and then he is off. He is a citizen of Malaysia. He left Singapore 26 September 1984. He has not come back since. If he had come back, I could have seen him.

He sent me photocopies of his passport (our emphasis). He has many passports. I know he had a restricted Malaysia/Singapore restricted passport. I do not know when he will come back.

In cross examination, he said:

My father's *last phone call was from Argentina. His Singapore address is 66 Chun Tin Road. My home as well* (our emphasis). I do not think he has left Singapore for good. Neither to avoid creditors. He has interest in many Singapore companies.

Not out of Singapore to avoid creditors. He is concerned in first defendants, now under winding-up. No other companies of his in winding-up proceedings. When in Singapore, he does business as a general merchant. *Whole family resides at 66 Chun Tin Road* (our emphasis).

[To Court: Yes, there are two telephones listed in directory in my father's name at 66 Chun Tin Road.

I do not know how my father knew of writ.]

Witness volunteers: *My mother picked up summons and she told him in telephone conversation* (our emphasis).

From the affidavits and the evidence of the appellant's son, it is clear that the appellant travels extensively. No process server would be able to catch up with him. It is also clear that he is in contact with his family. He is able to send them photocopies of his passport. He has called from Argentina. It is also clear to us that the writ and statement of claim served at No 66 Chun Tin Road were brought to the appellant's notice. The requirement of O 62 r 5 being satisfied, we therefore dismissed the appeal.

Appeal dismissed.

Solicitors: *Tang & Co; Haridass Ho & Partners.*

Reported by *Zarinah Marican*

Chen Chien Wen Edwin v Pearson

HIGH COURT (SINGAPORE) — ORIGINATING MOTION NO 9 OF 1991
CHAO HICK TIN J
25 FEBRUARY 1991

Civil Procedure — Powers of High Court — Manner of exercising powers — Effect of Rules of the Supreme Court 1970

Civil Procedure — Appeal — Notice of appeal — Filing of extension of time — Jurisdiction

The respondent wished to appeal against certain orders granted on 26 November 1990 by the court to the petitioner on matters relating to custody and other ancillary matters. However she failed to file and lodge the notice of appeal within time. This originating motion was taken for an order that the time for filing the notice of appeal be extended.

The petitioner objected on the preliminary point that the High Court had no jurisdiction to hear this application and that it should be made to the Court of Appeal.

Held, allowing the preliminary objection:

(1) The power of the High Court to extend time must be exercised in accordance with the Rules of the Supreme Court 1970. Order 3 r 5 merely sets out the powers generally without specifying what applications should be made to the High Court or to the Court of Appeal.

(2) Order 57 r 17 implies that any application for extending time for serving notice may only be done by the Court of Appeal, unless it falls within one of the exceptions.

(3) If the application for extension of time to file and serve a notice which is made before the expiry of the prescribed time limit, the court of first instance would have the jurisdiction to entertain that application.

(4) The defect here touches on jurisdiction and cannot be disregarded.

Cases referred to

1 *Karno* v *Spratt* [1909] WN 251 (refd)
2 *Austin Reed Ltd* v *Royal Insurance Co Ltd* [1956] 1 WLR 765; [1956] 2 All ER 509 (folld)
3 *Lee Lee Cheng* v *Seow Peng Kwang* [1960] MLJ 1 (distd)
4 *R* v *Bloomsbury & Marylebone County Court* [1976] 1 All ER 897 (distd)

Legislation referred to

Supreme Court of Judicature Act (Cap 322, 1985 Ed) s 18(2)(h), (3)
Rules of the Supreme Court 1970 O 3 rr 3, 5, O 57 rr 4, 17

Sim Mei Ling for the applicant.
KS Rajah for the respondent.

Cur Adv Vult

Chao Hick Tin J: This originating motion is brought by the respondent in Divorce Petition No 1789 of 1989 seeking an order that the respondent's time for appealing against the order of the learned judicial commissioner made on 26 November 1990 relating to custody and other ancillary matters in the divorce proceedings be extended pursuant to the powers conferred upon the

High Court under O 3 r 5 of the Rules of the Supreme Court 1970 ('RSC'). The ground upon which the application is made is that there was a bona fide mistake on the part of the solicitor in the computation of time for the filing of a notice of appeal as he thought, quite wrongly, that the period of the court vacation was excluded in the computation of the prescribed one-month time limit for the filing of the notice; it was a case of a misreading of O 3 r 3 of the RSC.

This originating motion is commenced in the High Court of the Republic of Singapore as the heading of the motion papers so stated. Counsel for the petitioner opposed the motion and raised a preliminary point of law that the High Court has no jurisdiction, in the circumstances of the present case, to extend time to enable the respondent to file the notice of appeal. His submission is that the application should be made to the Court of Appeal which is the only forum which has jurisdiction in such a case to grant the extension of time. He relied in particular on O 57 r 17 and the commentary in *The Supreme Court Practice* (1979 Ed) on this rule. He stressed that the later editions of *The Supreme Court Practice* are not entirely appropriate to the position in Singapore because since 1981 the English RSC has undergone quite some changes. He also cited to me two cases, *Karno* v *Spratt*[1] and *Austin Reed Ltd* v *Royal Insurance Co Ltd*,[2] in support of the stand which he is taking.

Counsel for the respondent submitted that the application is made under O 3 r 5. She said that in accordance with s 18(2)(h) of the Supreme Court of Judicature Act (Cap 322, 1985 Ed) ('the Act'), the High Court has the power to enlarge the time prescribed for the filing of a notice of appeal. She referred to *Lee Lee Cheng* v *Seow Peng Kwang*[3] and *R* v *Bloomsbury & Marylebone County Court*[4] and relied on a statement in *Mallal's Supreme Court Practice* (2nd Ed) Vol 1 at p 15 which reads as follows:

> The High Court in Singapore by O LV r 3(1) RSC 1934 and now O 57 rr 3 and 17 RSC 1970 has the power to enlarge the time for giving notice of appeal ...

Let me first set out the relevant provisions which touch on the power of the High Court and the Court of Appeal to grant extension of time. Section 18(2)(h) and (3) of the Act provide:

> 18(2)(h) ... the High Court shall have ... power to enlarge or abridge the time prescribed by any written law for doing any act or taking any proceeding, although application therefor is not made until after the expiration of the time prescribed:
>
> Provided that this provision shall be without prejudice to the provisions of any written law relating to limitation.
>
> (3) The powers referred to in subsection (2) shall be exercised in accordance with any written law or Rules of Court relating to them.

Order 3 r 5 of the RSC provides:

> 5(1) The Court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorised by these Rules or by any judgment, order or direction, to do any act in any proceedings.
>
> (2) The Court may extend any such period as is referred to in paragraph (1) although the application for extension is not made until after the expiration of that period.
>
> (4) In this Rule references to the Court shall be construed as including references to the Court of Appeal.

These provisions merely set out the general powers of the High Court and the Court of Appeal to grant an extension or abridgement of time. In the light of s 18(3) of the Act it is clear that the power of the High Court to extend time in cases like the present must be exercised in accordance with the RSC. Even O 3 r 5 merely sets out the powers generally without specifying what applications should be made to the High Court or to the Court of Appeal.

Now under O 57 r 4, every notice of appeal must be filed and served within one month from the date of the order against which an appeal is intended to be made. Rule 17 of the same Order appears to me to be most pertinent, and I shall quote it in full:

> Without prejudice to the power of the Court of Appeal under Order 3, Rule 5, to extend the time prescribed by any provision of this Order, the period for serving notice of appeal under Rule 4 or for making application *ex parte* under Rule 16(3) may be extended by the Court below on application made before the expiration of that period.

There are two possible ways of looking at r 17; but in my view both lead to the same result in so far as this case is concerned. First, the opening words of r 17 'without prejudice to the power of the Court of Appeal ... to extend the time prescribed by any provision of this Order', effectively imply that extending any time prescribed under O 57 may only be done by the Court of Appeal. What follow thereafter in r 17 are the exceptions where the court below is permitted to grant extension of time. As the circumstances of the present case do not fall within the exceptions, it must mean that only the Court of Appeal may grant the extension applied for.

I think this construction finds support in the following statement appearing in para 59/15/1 of *The Supreme Court Practice* (1979 Ed):

> The effect, therefore, of O 59 r 15, (the equivalent of our O 57 r 17) is that while the Court of Appeal has power to enlarge or abridge the time, and may enlarge it after its expiration, the *Court below has only power to enlarge the time upon application made before its expiration, and no power to abridge* it (*Re 20 Exchange Street, Manchester, Austin Reed, Ltd* v *Royal Insurance Co* [1956] 1 WLR 765; [1956] 2 All ER 509), *and this power to enlarge only applies to the times for serving notice of appeal* under r 4, and the time limited by r 14(3). *Other times specified in O 59 can only be extended by*

the Court of Appeal, except those limited by r 5(1) (where the 'proper officer' is empowered) and r 18(2) (where the 'Appeal Tribunal' can alone extend it). Orders for abridgment of time are rarely made. (Emphasis added.)

The construction is also supported by the case *Austin Reed Ltd* v *Royal Insurance Co*[2] (cited in the passage of *The Supreme Court Practice* quote above) where provisions similar to our present O 3 r 5 and O 57 rr 4 and 17 were applicable and Danckwerts J in the Chancery Division held that he had no power to abridge the time for appealing prescribed in the rules.

As regards the case *Karno* v *Spratt*,[1] I am afraid the report is so brief that I have not been able to obtain much guidance from it. But what seems clear is that the Court of Appeal there held that a judge of first instance had no jurisdiction to grant an extension of time for appealing where, at the time of the application for extension, the time limit had expired. The relevant rule prevailing in 1909 was O LXIV r 7 and I have not been able to lay my hands on a copy of it.

I now come to the alternative construction of r 17. The second part of r 17 expressly provides that where the application is made before the expiration of the time limit for serving the notice of appeal the court below is allowed to extend time to effect the service. It does not explicitly touch on the question of extending time to file a notice of appeal. Taking a purely literal view, it can arguably be said that the rule has nothing to do with an extension of time to file a notice of appeal, which is different from service of the notice. Now taking this argument one step further, it must necessarily mean that in such a case (where the time limit has expired) you will have to make two applications, one to the High Court to extend time to file the notice of appeal and the other to the Court of Appeal to extend time to serve the notice out of time. Such a consequence would indeed be odd and could not have been contemplated by that rule. In my judgment, the only sensible and practical construction to be placed on the second part of this rule is that where the time limit prescribed for filing and serving the notice of appeal has expired, and as prescribed in r 4 the time limit is the same for both, the application to extend time to do both the acts must be made to the same forum, the Court of Appeal.

Following from what I have said in the immediately preceding paragraph, if the application for an extension of time to file and serve a notice of appeal is made before the expiry of the prescribed time limit, the court of first instance would have the jurisdiction to entertain that application. Of course, in reality I do not think it likely that a party would want to apply for an extension of time to file a notice of appeal out of time if at the time of the application the time limit prescribed for filing the notice has still not expired. It would probably be more convenient to just file the notice of appeal first and if the applicant/appellant would like to have a bit more time to review the case before serving the notice of appeal on the respondent, he need only apply for an extension of time to do that and that application will clearly come within rule 17.

Accordingly, in my judgment, a court of first instance has no jurisdiction to hear the present application for extension of time. The application should be made by way of an originating motion to the Court of Appeal. The case *Lee Lee Cheng* v *Seow Peng Kwang*,[3] cited by the applicant, has no real relevance to the issue before me; neither is the case *R* v *Bloomsbury & Marylebone County Court*.[4] These two cases did not concern the construction of a rule like r 17 and the issues there were quite different.

I appreciate that under s 36(1) of the Act any matter pending before the Court of Appeal, other than the disposal of the appeal itself, may be heard by a single judge. Counsel for the respondent submitted that an application for an extension of time to file a notice of appeal would be an application which could be so heard by a single judge. While one could in a broad sense say that this is only a formal defect but I am afraid it is a defect that touches on jurisdiction, which is not something I could disregard.

In passing I would like to add that there is another formal defect in the motion papers. The parties are named as they appear in the divorce proceedings, with the applicant in this motion being designated as the respondent. This is clearly wrong. The respondent in the divorce proceedings should be named as the applicant here, as she is applying for relief, and the petitioner there, the respondent.

In the result the motion is dismissed with costs fixed at $1,200.

Motion dismissed.

Solicitors: *Ang JW & Partners; B Rao & KS Rajah.*

Reported by *S Surenthiraraj*